In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR, v. JOHN BITTY. } No. 503.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on a writ of error to the Circuit Court for the Southern District of New York. John Bitty, the defendant in error, was indicted in that court for violation of section 3 of the Immigration Act of February 20, 1907 (34 Stat., 898), the material part of which reads as follows:

THE STATUTE.

> Whoever shall directly or indirectly import or attempt to import into the United States any alien woman or girl for the purpose of prostitution *or for any other immoral purpose* * * * shall in every such case be deemed

guilty of a felony and on conviction thereof be imprisoned not more than five years and pay a fine of not more than $5,000.

THE INDICTMENT.

The indictment charges that "John Bitty * * * did unlawfully, willfully, and feloniously import into the United States of America from a foreign country, to wit, England, a certain alien woman * * * and it was the purpose of said John Bitty in bringing and importing the said alien into the United States as aforesaid that she should live with him as his concubine."

A demurrer was entered to the indictment. This was sustained by Judge Hough, and from the judgment a writ of error was sued out to this court.

ARGUMENT.

The declared intention of Congress is plain and unambiguous, but it will not be amiss to review the legislative provisions in relation to the importation of women, contained in prior acts.

The act of March 3, 1875 (18 Stat., pt. 3, p. 477), prohibited the "importation of women for purposes of prostitution," and made it also unlawful for "women imported for purposes of prostitution to immigrate into the United States." Although a number of statutes dealing with the general subject of immigration were passed within the next few years, it was not until 1903 that this particular phase of the general subject was again touched upon. In the act of March 3, 1903 (32 Stat., p. 1213), it was provided

(sec. 2) that the "following classes of aliens shall be excluded from admission into the United States * * * prostitutes and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution," and section 3 of the same act provides "that the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden, and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars."

The report of the committee (H. R. No. 3021, vol. 2, 59th Cong., 1st sess.) having charge of the bill, which was finally enacted into law as the act of February 20, 1907, reads in part as follows:

> Your committee has deemed it advisable to report a comprehensive measure specifically repealing the immigration acts of March 3, 1903, and March 22, 1904, in order that for purposes of references all immigration legislation since 1902 might appear in a convenient form. The general immigration law of to-day is for the most part the act of March 3, 1903.
>
> Ten sections of that act are reenacted in this bill without any change whatever. Two sections are omitted from the present bill, as they do not relate to the subject of immigra-

> tion. Neither of these sections, however, are repealed. Twenty-eight sections of the old act are changed in greater or less degree, as specified below.

Under the heading "Specific changes" appears the following:

> Sec. 3. Strengthens the provisions with regard to the importation of prostitutes.

Under the heading "Reasons for various changes" this statement appears:

> In this section it is attempted to extend the scope of the law, so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up.

While it is apparent that the scope of the act, so far as it relates to the importation of women, has been broadened, the committee report does not throw any light on the meaning of the words "or for any other immoral purpose." That meaning must, therefore, be determined by the ordinary rules of statutory construction.

I.

The rule ejusdem generis does not apply.

In sustaining the demurrer the learned trial judge relied on the well-known rule of construction that where general terms follow specific words their meaning is to be taken as limited by the words which precede them. In his opinion Judge Hough said:

> A discussion of the difference between this status (concubinage) and that of the prosti-

> tute would be both needless and nauseating; it suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class.

The rule of *ejusdem generis* is merely a technical rule of construction, and, as was said by Judge Story:

> This is a legislative act, and is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature. (*Wilkinson* v. *Leland*, 2 Peters, 662.)

The courts have frequently declined to apply the rule *ejusdem generis* where by so doing the manifest intention of the legislature would have been defeated.

In *State* v. *Holman* (3 McCord, 306) the supreme court of South Carolina held, in construing a statute which forbade putting into "any bag, bale or bales of cotton any stone, wood, trash-cotton, cotton seed, *or any matter or thing whatsoever*, or causing the same to be done, for the purpose of cheating or defrauding any person," that it was violated by a person who put *water* in a bale of cotton.

In *State* v. *Williams* (2 Strob. L. R., 474), the indictment charged the defendant with a violation of an act making it larceny to take cotton, rice, or *other grain* from a field. The court ruled that taking *peas* was forbidden by the use of the words "other grain."

In *Regina* v. *Payne* (L. R., 1 C. C., 27) it was held that *a crowbar* conveyed into a jail for the purpose of assisting a prisoner to escape was an "other article or thing" within the meaning of the statute which provided that "Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or any letter *or any other article or thing* shall be guilty of felony," etc.

See also:

Willis v. *Mabon*, 48 Minn., 140, p. 155.
Webber v. *City of Chicago*, 148 Ill., 314.
Gillock v. *The People*, 171 Ill., 307.
Woodworth v. *State*, 26 Ohio St., 196.
Winters v. *Duluth*, 82 Minn., 127.
City of St. Joseph v. *Elliott*, 47 Mo. App., 418.
Foster v. *Blount*, 18 Ala., 687.
Haigh v. *The Town Council of Sheffield*, L. R., 10; Q. B., 102.
Bows v. *Fenwick*, L. R., 9; C. P., 339.

The immigration act of 1907 should be considered as a whole and in connection with other statutes *in pari materia* in determining its meaning. When we read sections 2 and 3 of the act together we find that the clearly expressed purpose of the Congress is to prevent the immigration of numerous classes of persons regarded as undesirable additions to the population of the country. Among those excluded are

idiots, epileptics, paupers, professional beggars, persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease, persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude, polygamists, anarchists, and contract laborers, as well as prostitutes and women or girls brought in for purposes of prostitution or for any other immoral purpose.

The Congress has deliberately made the exclusion of persons more comprehensive in the act of 1907 than in the acts of 1891 (26 Stat., 1084), 1893 (27 Stat., 569), and 1903 (32 Stat., 1213). The narrow construction placed upon the act by Judge Hough defeats the intention of the legislature, which clearly was to exclude various undesirable classes of persons, among others women of loose moral character.

II.

The application of the rule ejusdem generis does not help defendant in error.

Even if it should be conceded that the rule *ejusdem generis* should be applied, it is respectfully submitted that the finding of the court below is not warranted by the language of the statute. The words "for any other immoral purpose" must be given some meaning. To hold, as Judge Hough does, that they apply to the importation of procuresses is to limit them to an extent evidently not contemplated by the Congress and altogether unreasonable in itself. It can hardly be supposed that procuresses are likely to be imported in appreciable numbers and the statute

deals directly with the procuress when she brings in women for the purpose of prostitution.

The courts have repeatedly refused, even when applying the rule *ejusdem generis*, to apply it in a narrow sense.

In *Misch* v. *Russell* (136 Ill., 22), the question before the court was whether the county court had jurisdiction to determine an election contest for the office of president of the board of education of a school district, under a statute which provided:

> * * * the county court shall hear and determine contests of election of all other county, township, and precinct officers, and all other officers for the contesting of whose election no provision is made.

It was held that the county court had jurisdiction and that the rule *ejusdem generis* could not be held to require the rejection of general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated, and that in the statute under consideration county school districts and precincts had one quality or characteristic in common, namely, that they were all *quasi*-municipal corporations.

See also:

Queen v. *Edmundson*, 2 Ellis & Ellis, 77;
County of Union v. *Ussery*, 147 Ill., 204.

It might, perhaps, be urged with some show of plausibility that, if the rule *ejusdem generis* applies at all in the case at bar, section 3 of the act does not prohibit the importation of a woman who is a skilled counterfeiter or an expert pickpocket for the

purpose of following either of these undesirable and immoral occupations, but it is certainly evident that the importation of a woman for the purpose of illicit sexual intercourse is an act *ejusdem generis* with bringing her in for purposes of prostitution.

There remains only to consider the natural and proper interpretation to be placed upon the meaning of the word "immoral."

Webster's International Dictionary defines "immoral" as: "Not moral; inconsistent with rectitude, purity, or good morals; contrary to conscience or the divine law; wicked; unjust; dishonest; vicious; licentious," and gives as synonyms: "Wicked; sinful; criminal; vicious; unjust; dishonest; depraved; *impure; unchaste;* profligate; dissolute; abandoned; licentious; lewd; obscene."

The Standard Dictionary defines "immoral" as "inconsistent with moral rectitude; violating moral or divine law; morally wrong; specifically, *contrary to purity.*"

It can hardly be denied that the act of the defendant in error in importing the woman mentioned in the indictment is one which is generally condemned by the moral sense of all enlightened communities and is assuredly contrary to purity. But it is more than that. Both the common and statute law have uniformly recognized illicit sexual relations as immoral, and courts have repeatedly refused to enforce contracts the consideration for which was future illicit cohabitation. Such purpose is one which the law seeks to defeat and holds as against sound public

policy and deserving of condemnation by right-thinking men.

The Government submits that the conduct of the defendant in error was "immoral" *as matter of strict law* and believes that this position is amply sustained by the authorities.

Bouvier's Law Dictionary (vol. 1, p. 984) gives this definition of "immorality:"

> That which is *contra bonos mores.* In England it is not punishable in some cases at the common law, on account of the ecclesiastical jurisdictions—e. g., adultery. But except in cases belonging to the ecclesiastical courts, the court of King's Bench is the *custos morum,* and may punish *delicta contra bonos mores.*"

In *Ralston* v. *Boady* (20 Ga., 449), which was an action on debt for rent, the court held that there could be no recovery if the landlord, knowing that his house is to be used for prostitution, lets it for that purpose. "The contract being *contra bonos mores* will not support an action." (*Girardy* v. *Richardson,* 1 Esp. Rep., 13; *Jennings* v. *Throgmorton,* 21 E. C. L. Rep., 430; *Commonwealth* v. *Harrington,* 3 Pick. Rep., 26.)

In *Potter & Son* v. *Gracie* (58 Ala., 303), which was an action to set aside a conveyance made by one James Johnston to the defendant, Mary Gracie, who was his mistress, the court laid down the following rule:

> A contract, the consideration of which is future illicit cohabitation, like all agreements

> to do acts forbidden by the law of God, or in furtherance of immorality, is utterly void.

In *Walker* v. *Perkins, Admr.* (3 Burrows, 1568; 1 W. Black., 517), which was an action on a bond, it appeared that the bond was given by the intestate to the plaintiff, reciting that William Perkins (the intestate) and Sarah Walker had agreed to live together and therefore he had agreed to find her meat, drink, washing, lodging, etc., and to leave her an annuity of 60 pounds a year if he quitted her or she outlived him; and if they had any child he was to take care of and provide for it. But if she should leave him or go to another man, then he should not be obliged to provide for her any longer or to leave her an annuity.

The defendant pleaded that this was an agreement between the plaintiff and his intestate to live together in a state of fornication, and that such a bond made in pursuance and support of an agreement to live together in fornication is void in law. Lord Mansfield said:

> It is the price of prostitution, *praemium prostitutionis:* for if she becomes virtuous she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void.

In *Nye* v. *Moseley* (6 Barnewall & Cresswell, 133), Bayley, J., said:

> But fornication is immoral as well as adultery. Both are offenses punishable in the spiritual court.

See also:

Walker v. *Gregory*, 36 Ala., 180;
Winebrinner v. *Weisiger*, 19 Ky., 33;
Reed v. *Brewer*, 36 S. W., 99;
Mackbee v. *Griffith*, 2 Cranch., C. C., 336.

It is to be noted that in these cases no distinction in kind is drawn between mere illicit cohabitation and prostitution. Both are immoral in the eye of the law; if they differ, it is merely in the *degree* of immorality.

In a series of statutes various legislative bodies have recognized the immorality of both fornication and adultery:

Sec. 11, c. 38, p. 669, R. S. of Illinois;
Sec. 381, vol. 3 (1892), Code of Georgia;
Sec. 874, Code of District of Columbia;
Sec. 269, Statutes and Amendments, Code of California, 1905;
Sec. 5, p. 379, R. S. of Massachusetts;
Sec. 4952, Revised Laws of Minnesota, 1905.

It is respectfully submitted that under no possible construction of the law can the act of the defendant in error in importing the woman mentioned in the indictment for purposes of illicit sexual intercourse be regarded as other than a violation of the act.

The judgment, therefore, should be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
ALFORD W. COOLEY,
Assistant Attorney-General.

JANUARY, 1908.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

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BRIEF FOR THE DEFENDANT IN ERROR.

EDWARD A. ALEXANDER,
Counsel for Defendant in Error.

(20,906.)

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement.

The facts are fairly and accurately stated in the Government's brief.

ARGUMENT.

It seems to defendant's counsel that the expressed intent of Congress is indefinite and ambiguous. Prior statutes leading up to the one under consideration had for their object the exclusion of prostitutes and persons who procure their importation. For the purpose of strengthening the

provisions "with regard to the importation of prostitutes" (p. 4, U. S. Brief), and of extending the scope of the law (p. 4, U. S. Brief) "so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up," Congress enacted the statute in question.

What did Congress intend to include under the general phrase, "or for any other immoral purpose"?

Clearly Congress actually intended to prohibit and prevent "undesirable practices alleged to have grown up" in connection with the trade or business of importing prostitutes.

For the purpose of breaking up what the Solicitor General in his brief to advance this case has termed the "white slave trade," Congress prohibited the bringing into this country of any "prostitute," procuress, agent, employee, or other person, directly or indirectly, proximately or remotely, connected with bringing in prostitutes.

The phrase "or for any other immoral purpose," if literally interpreted, would cover cases where women or girls are brought in for the purpose of teaching them to steal, to swindle, or to commit other crimes not originating in the sexual relation.

Surely it was not the intention of Congress to cover any other cases than those directly or indirectly connected with the business or traffic of the "white slave trade" or of prostitution.

I.

THE RULE EJUSDEM GENERIS APPLIES.

The learned Attorney General in his brief cites several cases under point I which, in our opinion, have no application, for the reason that the general phrases therein used were necessary to carry out the objects for which the acts were passed. One illustration in this connection is as good as

many. In The State *v.* Holman (3 McCord, 306), cited by the Attorney General, the object of the statute was to prevent cheats and frauds in the sale and handling of cotton. The statute forbade the putting of stone, wood, trash-cotton, cotton seed, "or any matter or thing whatsoever" for the purpose of cheating or defrauding any person, and in that case it was of course held that it was immaterial what particular substance was put into any bag or bale, so long as it was placed there for the purpose of cheating or defrauding any person, as the very object of the legislation was to prevent cheating and defrauding in the sale of cotton.

In the case at bar, however, the object was not to include and make criminals out of every alien woman or girl brought here for some immoral purpose, but only to exclude and penalize practices connected with the business or traffic of importing prostitutes into this country.

It would serve no useful purpose to analyze every case cited by the learned Attorney General under point I in his brief, for the reason that in every one of these cases the general phrases were necessary in order that the act might prevent the evils at which the legislation was aimed.

Counsel for defendant conceded in the court below, and concedes here, that concubinage is highly immoral, and that it has been recognized as such by various States, which have passed laws against it. However, whether it be immoral or not is not the question. The only question involved on this point is whether or not Congress intended to legislate against those isolated cases where certain individuals come into this country with their mistresses.

The statute in question provides a very severe penalty. Being a criminal statute, it must be strictly construed, and under its terms a conviction cannot be had unless it is free from reasonable doubt that Congress intended to cover the case in question. Reasonable doubt has been defined to be moral certainty, and it must be clear from a careful perusal of the opinion of Judge Hough that the construction of this statute is not free from reasonable doubt.

The cases cited by the learned Attorney General under point II in his brief show that illicit sexual relations are immoral; that agreements founded upon promises of illicit cohabitation are void, as against good morals, and will not be enforced by courts; that fornication is immoral, as well as adultery; and that certain States of the Union and the District of Columbia have passed statutes penalizing both fornication and adultery.

Defendant's counsel concedes all of this, but cannot see how it is applicable to the case at bar. Because the State legislatures of several States have drawn no distinction between fornication and prostitution is no reason for holding that they could not legally have done so. The learned Attorney General states that both fornication and adultery, and also prostitution, are immoral in the eye of the law, and if they differ it is merely in the degree of immorality.

The same might be said of certain acts which are immoral and not criminal and those which are immoral and criminal. There is only a degree of difference in the immorality. For instance, the Court of Appeals of New York State held, in The People *v.* Blanchard, 90 N. Y., that the crime of obtaining property under false pretenses, *i. e.*, larceny, under the Penal Code of the State of New York, was not committed where the defendant obtained property upon false pretenses concerning his intention, although his act was just as immoral as the act of a criminal who obtained property by making false representations as to past facts.

Pollock in his work on Torts has said that a person's intention is a fact, just as much as any other fact. Yet, since it is a fact hardly capable of a correct ascertainment, it has been held that a false statement concerning it, on the faith of which property is obtained, is not criminal, although immoral to the highest degree.

It may be that Judge Hough should have stated in his opinion that the phrase "or other immoral purposes" should be construed to cover not only the case of procuresses, but

also the case of all agents or persons directly or indirectly engaged in the importation of prostitutes.

The term "prostitute" necessarily implies the idea of a female who hires the use of her body for money, whereas the term "mistress" implies the case of one who cohabits with a male without being married to him.

It may be, and in many cases is a fact, that a man's mistress never receives any pecuniary consideration for her immoral acts. There is a marked degree of difference between a prostitute and a mistress. If Congress had intended to cover the case of mistresses, who are not prostitutes, and who are in no way connected with the importation of prostitutes, or with the "white slave trade," Congress could and would readily have said so by the use of apt language, as it cannot be presumed that Congress, which is one of the most intelligent bodies of government in the world, does not know how to use the English language to adequately designate its intentions.

Had the defendant brought in this woman under the guise of her being his mistress, but intending that she be used for purposes of prostitution, he would be guilty. Congress did not intend to cover the case of men traveling abroad, who temporarily pick up some woman for their own purposes. Although such acts merit the most severe condemnation, and although they are highly immoral, it is not believed that Congress intended to act as the censor of all immorality, albeit in excluding aliens it has almost unlimited power.

Counsel for defendant only received a copy of the Government's brief on January 27, 1908, the date set for the argument, and has hurriedly dictated this brief in reply. Counsel for defendant, as stated to the court, has received no fee in this case; has not been able to communicate with his client, and came here out of respect for this court, at his own expense, and believes he is doing his full duty in submitting this brief, knowing that the court will use its own experience and judgment in construing this statute.

II.

It is incumbent on me in the performance of my duty to call the court's attention to the act under which the Government is prosecuting this appeal. It is believed that there is very serious doubt of the constitutionality of this act. The act gives the Government of the United States the right to appeal from a judgment or decree sustaining a demurrer to an indictment where the constitutionality or construction of a statute is involved. The act does not give to the defendant the right to appeal from a judgment or decree overruling his demurrer.

Furthermore, the act gives the Government the right to appeal in a criminal case where the construction of the statute is involved, and not in a criminal case where the defendant is indicted for violating a statute, but in which the construction of the statute does not come into question.

Furthermore, had the defendant in this case pleaded not guilty and gone to trial, had a jury been sworn, and a motion made for the direction of a verdict of acquittal, and granted, it is believed, under the jeopardy clause of the Constitution, the defendant could not again be tried, and no appeal would lie, but because he demurred an appeal does lie.

The difference between the State legislatures and Congress is that the State legislatures possess all of the powers of the people of the State, except those which are expressly prohibited, whereas Congress only possesses those powers expressly granted or necessarily implied to carry out the objects for which Congress was created or for which the powers conferred were given.

It is conceded that Congress has the power to increase or diminish the appellate power of the Supreme Court, but it is doubted whether the people of the United States have given to Congress the power to pass partial legislation, which affects differently persons in the same class covered by the legislation. It is claimed Congress has no such power.

If Congress did not have power to pass the act enabling the Government to prosecute this appeal, then that act is absolutely void, because an unconstitutional act is a mere nullity; this court has no jurisdiction, and this appeal is not before it.

This question may be considered either on a motion to dismiss the appeal or at any stage of the proceedings, if the act providing for the appeal is unconstitutional and void, since in that event it would go to the jurisdiction of the court.

Section 2, article 4, of the Constitution provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The rights of different citizens may at any time be involved.

It is submitted that if a demurrer to an indictment is sustained for any other reason than upon the merits, the Government can prosecute the defendant by re-indictment. If, however, the merits were involved and the demurrer were sustained, the defendant would go free in every case except where the constitutionality of an act or its construction were in question.

An act providing for appeals in certain specific cases, and also giving the Government the right to appeal and not giving the same right to the defendant, seems not only to be partial legislation, but seems to be also in conflict with the Constitution, in that "the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States."

While there may be some doubt about this, our point I is sound, and therefore the judgment should be affirmed.

Respectfully submitted,

EDWARD A. ALEXANDER,
Counsel for Defendant in Error.